NOTES OF CASES.

Opinion of the West Virginia Supreme Court of Appeals in the Habeas Corpus Cases.—State ex rel. L. A. Mays *v.* M. L. Brown, Warden, etc., and State ex rel. S. F. Nance *v.* M. L. Brown, Warden, etc. Petitioners remanded.

1. *Martial Law—Declaration—Power of Governor.*—The governor of this state has power to declare a state of war in any town, city, district or county of the state, in the event of an invasion thereof by a hostile military force or an insurrection, rebellion or riot therein, and, in such case, to place such town, city, district or county under martial law.

2. *Constitutional Law—Militia—State Sovereignty—State Self-Preservation.*—The constitutional guaranties of subordination of the military to the civil power, trial of citizens for offenses cognizable by the civil courts in such courts only and maintenance of the writ of habeas corpus are to be read and interpreted so as to harmonize with other provisions of the constitution authorizing the maintenance of a military organization and its use by the executive to repel invasion and suppress rebellion and insurrection, and the presumption against intent on the part of the people, in the formulation and adoption of the constitution, to abolish a generally recognized incident of sovereignty, the power of self preservation in the state by the use of its military power in cases of invasion, insurrection and riot.

3. *War—Declaration—Review by Courts.*—It is within the exclusive province of the executive and legislative departments of the government to say whether a state of war exists and neither their declaration thereof, nor executive acts under the same, are reviewable by the courts, while the military occupation continues.

4. *War—Military Commission—Trial of Offenses.*—The authorized application of martial law to territory in a state of war includes the power to appoint a military commission for the trial and punishment of offenses within such territory.

5. *Martial Law—Overthrow of Courts.*—Martial law may be instituted, in case of invasion, insurrection or riot, in a magisterial district of a county and offenders therein punished by the military commission, notwithstanding the civil courts are open and sitting in other portions of the county.

6. *Martial Law—Previous Offenses.*—Acts committed in a short interim between two military occupations of a territory for the suppression of insurrectionary and riotous uprisings and such in their general nature as those characterizing the uprising are punishable by the military commission within the territory and period of the military occupation.

NOTE.—*Martial Law—Power to Declare.*—Martial law is called into action by Congress, or temporarily, when the action of Congress

can not be invited, and in case of justifying or excusing peril, by the president, in times of insurrection or invasion, or civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights. Ex parte Miligan, 4 Wall. (U. S.), 2, 142.

So, also, a state may, itself, determine whether a crisis demands the declaration of martial law. 8 U. S. E., p. 272, title, Martial Law.

Thus, in Luther *v.* Borden, 7 How. (U. S.) 1, 45, 12 L. Ed. 581, it is held that "if the government of Rhode Island (during the insurrection of 1841-42) deemed armed opposition so formidable, and so ramified throughout the state, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority."

Though the power to declare martial law in a state is vested primarily in the legislature thereof, yet instances are not wanting in which it has been held that the state executive may, in a case of necessity, temporarily declare martial law to exist. Thus, in Commonwealth ex rel. Wadsworth *v.* Shortall, 206 Pa. 165, 65 L. R. A. 193, it was held that the executive of Pennsylvania had the power to issue a proclamation or declaration declaring the existence of a condition of qualified martial law. In the above case it was held that such condition of qualified martial law exists when the governor is compelled to call out the militia and direct it to restore order, when rioting and disorder exist in certain counties of the state by reason of a strike.

The governor of a state, in one or more of the counties of which there has for months been maturing a dangerous secret insurrection, continued in defiance of proclamation after proclamation to the people to break up the unlawful combinations existing, where such executive has brought to bear every civil power to restore peace and order, but in vain, and the Constitution provides that such executive shall have power to call out the militia to execute the law, suppress riots or insurrections, etc., may declare such locality in his state to be in a state of insurrection, take military possession, and order the arrest and detention of persons engaged in such evil practices, and hold them as military prisoners; and, upon the refusal of the commandant of the military forces claiming to act by order of the governor to deliver up the prisoners in answer to a writ of habeas corpus, which refusal the governor of the state, in a communication to the court, approves and confirms, the court will not, during the continuance of such insurrection, take further steps to enforce the execution of the writ. Ex parte Moore, 64 N. C. 802; Ex parte Kerr, 64 N. C. 816. See note, Commonwealth ex rel. Wadsworth *v.* Shortall, 206 Pa. 165, 65 L. R. A. 193, 197.

In Moyer *v.* Peabody, 29 Sup. Ct. 235, it was held that the declaration of the governor of Colorado that a state of insurrection existed was conclusive of that fact.

In this case it was held that imprisonment for two and one half months under the order of the governor, without sufficient reason, but in good faith, in the exercise of his power, under the state constitution and laws to call upon the military arm of the state government to suppress an insurrection, does not deprive the person imprisoned of his liberty without due process of law.

It was further held that a suit against the governor and certain officers of the national guard of the state, founded on such imprisonment, was not within the original jurisdiction of a federal circuit court under U. S. Rev. Stat., § 629, U. S. Comp. Stat. 1901, p. 506, as a suit authorized by law to be brought to redress the deprivation of any right secured by the constitution of the United States.

The judge advocate-general of England, before a committee of the House of Commons, in the case of martial law declared in Ceylon, in answer to a question put to him, stated that: "I believe the law of England is, that a governor, like the crown, has vested in him the right, where the necessity arises, of judging of it, and being responsible for his work afterwards, so to deal with the laws as to supersede them all, and to proclaim martial law for the safety of the colony." Quoted in In re Egan, Fed. Cas. No. 4,303 (5 Blatchf. 319).

Same—Necessity for Declaration of Martial Law to Be Affirmatively Shown.—Martial law can be indulged only in case of necessity, and, when the necessity ceases, martial law ceases. The necessity must be shown affirmatively by any person who assumes to exercise martial law. In re Egan, Fed. Cas. No. 4,303 (5 Blatchf. 319.)

Same—Subordination of Civil to Military Officers.—The authority of ordinary civil officers of the government is subordinated to that of military officers when the governor, in response to a call for military aid to restore order, which the civil officers are not able to do, details a military officer with troops at his command to perform that duty. Commonwealth ex rel. Wadsworth *v.* Shortall, 206 Pa. 165, 65 L. R. A. 193.

A military officer charged with the duty of suppressing a riot can not be punished by the civil authorities for acts which, at the time, seemed necessary for the accomplishment of his commission. Commonwealth ex rel. Wadsworth *v.* Shortall, 206 Pa. 165, 65 L. R. A. 193.

Injuries from Automobile Operated by Minor Son.—A kind and indulgent father purchased an automobile for the general use of his family. It was registered in his name, but the only member of his family licensed to operate it was his minor son. The mother had permission to use the machine whenever she desired, and the son, at her request, was expected by the father to take her out for a ride when she wanted to go. On an afternoon when the son was driving the car with his mother, at her request, plaintiff was injured by a